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No. 84-1844

In The
# Supreme Court of the United States
October Term, 1984

JOSEPHINE BURRIS,

*Petitioner,*

vs.

NORTHERN ASSURANCE COMPANY OF AMERICA,

*Respondent.*

BEST AVAILABLE COPY

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Rule 28.1 Statement-Parent Companies, Subsidiaries and Affiliates of North Assurance: American Employers Ins. Co., Commercial Union Ins. Co., Commerical Union Life Ins. Co. of America, Employers' Fire Ins. Co., and Employers' Surplus Lines Ins. Co.

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October Term, 1984

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JOSEPHINE BURRIS,

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vs.

NORTHERN ASSURANCE COMPANY OF AMERICA,

*Respondent.*

—o—

## MOTION TO DISMISS OR AFFIRM APPEAL FROM SUPREME COURT OF KANSAS

—o—

The Respondent moves the Court to dismiss the petition for certiorari and/or appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Kansas on the ground that it is manifest that the questions of which the decision of the cause depends are so unsubstantial as not to need further argument.

—o—

## I. THE CONTRACT AND STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

### A. The Contract

This case arises out of a contract entered into by the Petitioner, Northern Assurance Company of America, and the Petitioner's husband who died in a motor vehicle accident. The Petitioner has made claim for certain benefits provided under the motor vehicle liability insurance contract of Respondent. Respondent claims that the contract did not provide the benefits that the Petitioner claims. The particular benefits are the "survivor's benefits" as provided in the personal injury protection endorsement of Respondent's policy. Respondent claims that no premium was paid for these benefits and the policy does not provide these benefits under the circumstances of this case. Petitioner contends that the law which empowers the Respondent to deny the benefits claimed by the Petitioner in the contract is unconstitutional. As such, the Petitioner asks that the law be held unconstitutional and the contract be reformed or, in this case, broadened so as to provide the benefits in this situation. Respondent contends that the individual contract controls and the policy cannot be reformed to broaden coverage even if the law were to be declared unconstitutional.

### B. The Statutes

The petition for certiorari raises the question of the validity of certain provisions of the Kansas Automobile injury Reparations Act, K.S.A. 40-3101 through K.S.A. 40-3121, as amended. Specifically, the statutes being at-

tacked are K.S.A. 40-3103(l) and K.S.A. 40-3103(y). Those statutes provide as follows:

"K.S.A. 40-3103

(l) 'Monthly earnings' means: (1) In the case of a regularly employed person or a person regularly self-employed, one-twelfth (1/12) of the annual earnings at the time of injury; or (2) in the case of a person not regularly employed or self-employed, or of an unemployed person, one-twelfth (1/12) of the anticipated annual earnings from the time such person would reasonably have been expected to be regularly employed. In calculating the anticipated annual earnings of an unemployed person who has previously been employed, the insurer shall average the annual compensation of such person for not to exceed five (5) years preceding the year of injury or death, during which such person was employed."

"K.S.A. 40-3103

(y) 'Survivors' benefits' means total allowances to all survivors for: (1) Loss of an injured person's monthly earnings after his or her death, up to a maximum of not less than six hundred fifty dollars ($650) per month; and (2) substitution benefits following the injured person's death. Expenses of the survivors which have been avoided by reason of the injured person's death shall be subtracted from the allowances to which survivors would otherwise be entitled, and survivors' benefits shall not be paid for more than one (1) year after the injured person's death, less the number of months the injured person received disability benefits prior to his or her death."

These statutes set forth the benefits which are to be provided survivors under the Kansas Automobile Injury Reparations Act. The precise determination of what benefits apply also incorporate provisions of other statutes

in the KAIRA such as K.S.A. 40-3103(q) which defines "personal injury protection benefits" as including disability benefits, funeral benefits, medical benefits, rehabilitation benefits, substitution benefits and survivors' benefits required to be provided in motor vehicle liability insurance policies pursuant to the KAIRA. Also, K.S.A. 40-3104 requires that all owners of motor vehicles in Kansas have an insurance policy in effect which provides these personal injury protection benefits pursuant to K.S.A. 40-3107 that are applicable under the situations described in K.S.A. 40-3109.

### C. The Proceedings Below

The Petitioner is the widow of Lloyd Burris, who was the owner of a motor vehicle that had insurance coverage which complied with the KAIRA. Mr. Burris died in an automobile accident. The Petitioner filed suit to recover survivors' benefits for $153.00 per month for loss of a private pension and a decrease of $483.00 per month for social security benefits which Mr. Burris had received.

The Respondent denied coverage for these benefits because they do not constitute survivors' benefits as they are not monthly earnings so as to qualify for a covered benefit under the personal injury protection benefits coverage. Mr. Burris was unemployed at the time of his death, having previously retired.

On May 10, 1983, Petitioner filed a declaratory judgment action claiming that the KAIRA was unconstitutional and violated the Fourteenth Amendment of the United States Constitution claiming that it denied retired persons and their survivors equal protection of the law and due process of law. Petitioner filed a motion for judg-

ment on the pleadings and Respondent filed a motion for summary judgment. The trial court ruled that the statutes of the KAIRA were unconstitutional and discriminated against retired persons. Respondent filed an appeal to the Kansas Supreme Court which was decided on November 30, 1984, wherein the Kansas Supreme Court in a unanimous decision reversed the lower court's ruling. The Kansas Supreme Court found that the KAIRA did not violate the equal protection and due process rights of Petitioner as there was a reasonable basis for the distinction between wage earners and non-wage earners.

Petitioner filed a motion for rehearing before the Kansas Supreme Court which was denied.

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## II. ARGUMENT

This appeal presents no substantial federal question warranting review by this Court.

1. Petitioner cites as a basis for certiorari that the question of whether the KAIRA treats survivors of wage earners and non-wage earners differently is of "national concern" because of the number of state enacted mandatory insurance programs. Clearly, this is an insufficient basis for establishing a "substantial" federal question so as to come within United States Supreme Court's jurisdiction. There are fifty states with fifty different and varying laws governing motor vehicle liability insurance. The states have the right to enact these laws governing their residents and owners and operators of motor vehicles within their jurisdiction. The states were specif-

ically given this right under the McCarren-Ferguson Act 15 U.S.C. § 1011, et seq. Because of the various different kinds of motor vehicle liability insurance laws in the various different states, a decision on whether the Kansas law governing its treatment of survivors of wage earners and non-wage earners is not substantial and not of national concern. A decision on this point would have no bearing upon the other states' motor vehicle insurance systems because of the wide variance in those systems.

For example, Kansas has adopted a form of no-fault automobile insurance. To have a no-fault insurance plan, generally three elements must exist. The first is that motor vehicle liability insurance be compulsory. (K.S.A. 40-3104). Second, is that all policies of motor vehicle liability insurance provide first party benefits. (K.S.A. 40-3109). And, third, is the right to sue in tort for pain and suffering be limited in certain situations. (K.S.A. 40-3117). Twenty-three states are *considered* to have some form of no-fault insurance.[1] This is misleading

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[1] See Ark.Stat.Ann. §§ 66-4014 to -4021 (Supp. 1980) (effective July 1, 1974); Colo.Rev.Stat. §§ 10-4-701 to -4-723 (1974 & Supp. 1980) (effective April 1, 1973); Conn.Gen. Stat. §§ 38-319 to -351a (1979) (effective Jan. 1, 1973); Del.Code Ann. tit. 21, § 2118 (1979) (effective Jan. 1, 1973); Fla.Stat.Ann. §§ 627-730, -741 (West 1972 & Supp. 1980) (effective Jan. 1, 1972); Ga. Code §§ 56-3401b to -3413b, 56-9915.2 (1977 & Supp. 1980) (effective March 1, 1975); Hawaii Rev.Stat. §§ 294-1 to -41 (Supp. 1980) (effective Sept. 1, 1974); Ill.Rev.Stat. ch. 73, §§ 1065.150 to .163 (1971) (held unconstitutional on April 17, 1972); Kan.Stat.Ann. §§ 40-3101 to -3121 (Supp. 1979) (effective Jan. 1, 1974); Ky.Rev.Stat. §§ 304-39.010 to -340 (Supp. 1980) (effective July 1, 1975); Md.Ann. Code art. 48A, §§ 538-546 (1979 & Supp. 1980) (effective Jan. 1, 1973);

(Continued on following page)

however, because eight of those states have "add-on" plans which merely require that first party benefits be provided in the motor vehicle liability policies purchased in those states, but have no restriction on the right to sue. Those states are Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas and Virginia.

One state, Michigan, is considered to have a "pure" plan of no-fault which totally restricts the right to sue in tort and requires substantial first party benefits. While Michigan is considered to be a "pure" state, technically it does not quite reach that point because suits can be brought in certain instances.

The remaining thirteen states are considered to have "modified plans" of no-fault insurance. They are Colorado, Connecticut, Florida, Georgia, Hawaii, Kentucky, Massachuetts, Minnesota, New Jersey, North Dakota,

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(Continued from previous page)

Mass.Ann. Laws ch. 90 § 34A-340; ch. 175, § 113B, ch. 231, § 6d (Michie/Law. Co-op 1975 & Supp. 1980) (effective Jan. 1, 1971); Mich. Stat. Ann. §§ 24.13101 to -.13321 (Supp. 1980) (effective Oct. 1, 1973); Minn.Stat. §§ 65B.41 to .71 (West Supp. 1980) (effective Jan. 1, 1975); Nev.Rev.Stat. § 698.010 to .510 (1979) (repealed effective Jan. 1, 1980); N.J.Stat. Ann. §§ 39:6B-1 to -20 (West 1973 & Supp. 1980) (effective Jan. 1, 1976); Or.Rev.Stat. §§ 743 to -786.930 (1979) (effective Jan. 1, 1972); Pa.Stat.Ann. tit. 40, § 1009.101 to .1701 (Purdon Supp. 1980-81) (effective July 19, 1975); S.C. Code §§ 56-11-10 to -11-800 (Supp. 1979) (effective Oct. 1, 1974); S.D. Comp. Laws Ann. §§ 58-23-1 to -23-8 (1978 & Supp. 1978) (effective Jan. 1, 1972); Tex.Ins. Code Ann. art. 5.06-3 (Vernon Supp. 1979) (effective Aug. 27, 1973); Utah Code Ann. §§ 31-41-1 to 41-14 (1974 & Supp. 1979) (effective Jan. 1, 1974); Va. Code §§ 38.1-380.1, 380.2 (Supp. 1980) (effective July 1, 1972).

Pennsylvania, Utah and Kansas. Of these "modified plans" the benefits they provide on a first party basis and the restriction on the right to sue, vary in each state. It is safe to say that there are no two state no-fault systems which are the same. And, there are only twelve other states that have a system which is fundamentally similar to that of Kansas. But, each of these state plans differ from Kansas. Therefore, the question that petitioner has presented herein is not of national concern, and would affect no state's no-fault system other than Kansas. Therefore, the Court should not be misled by petitioner's argument that this case presents a substantial federal question. Petitioner's arguments are not novel.

No fault laws have been challenged as being unconstitutional on many different occasions. The constitutionality of these laws has been upheld in eleven instances, including Kansas. (See, *Manzanares v. Bell,* 214 Kan. 589, 522 P.2d 1291 (1974); *Pinnick v. Cleary,* 360 Mass. 1, 271 N.E.2d 592 (1971) 43 ALR3d 194; *Montgomery v. Daniels,* 38 NY2d 41, 340 N.E.2d 444, 378 NY2d 1 (1975); *Lasky v. State Farm Ins. Co.,* 296 So.2d 9 (Fla. 1974); *O'Donnell v. State Farm Ins. Co.,* 70 Mich.App. 487, 245 N.W.2d 801 (1976); *Rybeck v. Rybeck,* 141 N.J.Super. 481, 358 A.2d 828 (1976); *Gentile v. Altermatt,* 169 Conn. 267, 363 A.2d 1 (1975); *Singer v. Sheppard,* 464 Pa. 387, 346 A.2d 897 (1975); *Shavers v. Attorney General of Michigan,* 65 Mich.App. 355, 237 N.W.2d 325 (1975); *Faun v. McGuffey,* 534 S.W.2d 770 (Ky. 1975); *Kluger v. White,* 281 So.2d 1 (Fla. 1973). Therefore, Respondent's argument that the Court should accept jurisdiction because the question involving Kansas law is of national concern is incorrect and does not present a substantial federal question.

2. There is no substantial question of federal law presented for this Court to decide regarding the Kansas law allowing for the recovery of survivors' benefits under the KAIRA for losses of wage earners as opposed to losses of retirement income.

Petitioner claims that this issue is of national concern because under the Kansas law the Kansas Supreme Court has treated social security and retirement income differently than other income. Respondent contends that this argument is self-defeating. Petitioner admits that even Congress has treated social security and retirement benefits differently from other income, citing examples of how the benefits are treated differently under garnishment, termination procedures, and bankruptcy. This argument is self-defeating because if Congress recognizes a difference between these benefits and other income, then it would not appear to be discrimination and a violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution for Kansas to treat these benefits differently. It would appear that this difference in treatment by the United States Congress confirms the reasonableness of the classification by the Kansas Legislature.

3. The Kansas Legislature's treatment of survivors' benefits under the KAIRA by distinguishing between wage earners and non-wage earners is constitutional and is not a denial of equal protection or due process of law. The test utilized in determining if a legislative enactment violates equal protection principles is whether the classification bears a rational relation to the purpose of the legislation. *McDonald v. Board of Election,* 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969). The legislature is pre-

sumed to act within its constitutional power despite the fact that the application of this loss may result in some inequity. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961).

The equal protection clause goes no further than to prohibit invidious discrimination. *Williamson v. Lee Optical,* 348 U.S. 483, 99 L.Ed 563, 75 S.Ct. 461 (1955). The Supreme Court has consistently recognized that the Fourteenth Amendment to the United States Constitution does not deny to states the power to treat different classes of persons in different ways. *Reed v. Reed,* 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971). The Court is not the superintendent of legislative activity under principles of equal protection. *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). The principle of equal protection is not offended against simply because the exercise of the power may result in some inequality. *Louisville & Nashville R.R. v. Melton,* 218 U.S. 36, 54 L.Ed. 921, 30 S.Ct. 676 (1910). The state enjoys a wide range of discretion in distinguishing, selecting and classifying and it is sufficient that a classification is practical and not palpably arbitrary. *Orient Insurance Co. v. Daggs,* 172 U.S. 557, 43 L.Ed. 552, 19 S.Ct. 281 (1899). In the areas of economic and social legislation, a statutory plan does not violate the equal protection clause merely because the classifications contained therein are imperfect. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974). Nor does the equal protection clause require a state to choose between attacking every aspect of a problem or not attacking the problem at all. *Dandridge v. Williams,* 397 U.S. 471, 25 L.Ed. 2d 491, 90 S.Ct. 1153 (1970). As Justice Douglas said:

> "The problem of legislative classification is a perineal one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. (Citation) Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. (Citations). The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical, supra,* 348 U.S. at 489, 99 L.Ed. at 573, 75 S.Ct. at 465 (1955).

The Kansas Supreme Court examined the foregoing stated rules and decided that the reasonable basis test is the yardstick under which the statute must be measured both as to equal protection and as to due process. The Court then determined that there was a reasonable basis for the distinction between wage earners and non-wage earners.

In so doing, the Court cited numerous Kansas laws which distinguished between non-wage earners and wage earners. The Court cited K.S.A. 60-2307 which made personal property exempt from attachment or execution for wages; K.S.A. 44-312 which gives preference to payments of wages in the case of receiverships or assignments for the benefits of creditors; K.S.A. 60-2310 which restricts garnishment of wages; and K.S.A. 44-3113, the wage payment act. The Court noted that K.S.A. 40-3103 gives preference to wage earners as do the other statutes so as to make sure that families dependent upon these wages do not become destitute. The Court noted that the Legislature could have included within K.S.A. 40-3103 pensions, retirement income, payments in life estates, an-

nuities and lifetime trusts, alimony and other forms of income as "monthly earnings", but it choose not to do so.

As such, the Court did not simply distinguish between employed persons and those receiving social security retirement benefits, but made a distinction between those who are employed and those who are not. The Court noted that this distinction was rational in that the legislation was designed to protect wage earners and those dependent upon them. The protection was for the immediate loss of wages which has become immediately interrupted or terminated. The Court noted that non-employed persons do not sustain the same loss. The Court suggested that extending the same protection to all persons injured in motor vehicle collisions would greatly increase the coverage and thus greatly increase the cost of the insurance program in Kansas.

For the foregoing reasons, the KAIRA which distinguishes between benefits which are provided to wage earners and those who are not wage earners does not constitute a violation of the equal protection or due process clauses of the Fourteenth Amendment of the United States Constitution. The Kansas Legislature had the authority and the power to enact laws such as the KAIRA. In so doing, they made a decision as to who would be entitled to survivors' benefits under the Act. The Legislature has chosen to establish a classification allowing dependents of wage earners to obtain survivors' benefits whereas dependents of non-wage earners are not entitled to survivors' benefits. The Legislature had the power to make this classification, and it was based upon reasonable grounds to further the legislative objective of protecting those who were earning incoming and their dependents

and survivors. As such, this classification was rational and does not constitute a denial of equal protection or due process.

Therefore, the decision of the Kansas Supreme Court is a proper interpretation of the constitutionality of the Kansas Automobile Injury Reparations Act and should be affirmed by this Court.

4. Respondent contends that this case does not present a substantial question for the United States Supreme Court to decide because the action rests solely on the terms of an individual insurance contract entered into between the Respondent and Petitioner and is not based upon the statutory law as claimed by Petitioner.

An examination of the terms of the contract in light of the applicable law in force at the time of making, clearly reveals that the contract does not provide for the payment of lost social security or pension benefits. It is important to note that the Respondent's denial of benefits requested by the Petitioner is based not upon the existence of any statute, but rather upon the terms of the contract which represents the intentions of both parties at the time of the making.

The fact that the rights and obligations of the respective parties must be determined by the terms of this contract, and the fact that the contract presently does not provide for payment of lost social security or pension benefits, were admitted by the Petitioner in her petition. There, the Petitioner specifically requested that "the insurance policy in question be reformed into conformity with a constitutional construction of the KAIRA which would entitle plaintiff to recover 'survivors' benefits' to

compensate her for the loss she has incurred by reason of the death of her husband in the covered motor vehicle accident." Although the Petitioner recognizes that reformation of the contract is necessary if she is to recover against the Respondent, she has failed to allege proper grounds for reformation of this contract. (See, Restatement Second, Contracts § 155).

Assuming that the contract entered into by these parties in some way discriminates against social security recipients in that they pay the same premium but yet do not stand to receive the same potential benefits as similarly situated wage earners, this is not enough to state a cause of action against the Respondent. The major thrust behind the Petitioner's cause of action is that her constitutional rights, namely her right to due process and equal protection under the laws, have been violated. The constitutional protection which plaintiff has invoked in this case applies only to state actions. (United States Constitution, Amendment XIV, (1816)). Private conduct, however discriminatory, is not subject to review under the Fourteenth Amendment. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 477, (1974). Clearly, the constitutional wrongs which defendant alleges does not provide a basis for reforming this contract which was freely entered into by private parties. While there may be situations where the actions of private entities may be treated as actions of the State, the case at bar is not such a situation. Inasmuch as the Petitioner has failed to allege that the Respondent's actions should be treated as the actions of the State, the petitioner fails to state a cause of action based upon her constitutional challenges. When analyzing the actions of the Respondent insurance company for possible state

action, it is important to note "the mere fact that a business is subject to state regulations does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment to the United States Constitution. Nor does the fact that the regulation is extensive and detailed, . . . " *Jackson, supra,* at p. 350. Moreover, it is important to note that government action does not exist merely because an entity performs a public function. The proper question is whether the function performed has been traditionally the exclusive perogative of the State. *Gomez v. North Dakota Rural Development Corp.,* 704 F.2d 1056, 1059 (8th Cir. 1983). Because the issuance of insurance policies has not been traditionally the exclusive perogative of the State, the actions of the Respondent in issuing this contract of insurance appear to be purely private and not subject to review under the Fourteenth Amendment of the United States Constitution.

When examining the Petitioner's claims with respect to the constitutionality of the Kansas statute, it is apparent that the Petitioner in this suit has named the wrong party as defendant. Petitioner claims that the statute amounts to a taking without due process of law, but fails to allege any wrongdoing by the named defendant. It was the State of Kansas which required the Petitioner to purchase the coverage, not the Respondent. It there was a taking, then the taking was not by the Petitioner, but by the State of Kansas. Clearly, the allegations contained in the due process portion of plaintiff's petition and memorandum and writ of certiorari do not state a cause of action upon which relief can be granted against this Petitioner.

Similarly, the Petitioner's attacks on the statute, based on equal protection, do not state a cause of action against the Petitioner. If the State of Kansas had enacted the statute which violates the Constitution by denying Petitioner equal protection of the laws, and if the Petitioner has suffered damages by reason of this unconstitutional act, then the Petitioner should seek redress from the State and not from the Petitioner insurance company.

As such, this action on the contract by the Petitioner against the Respondent presents an individual contract question and not a substantial federal question to empower the United States Supreme Court to grant jurisdiction or certiorari. Therefore, jurisdiction and certiorari should be denied.

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## III. CONCLUSION

WHEREFORE, Respondent respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Respondent respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Kansas.

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